

There is no inconsistency or technological bias in placing ADSL under a federal access tariff.<sup>61</sup>

In fact, GTE's ADSL tariff does not impact the ESP access charge exemption any more than the federal ONA tariffs. With ONA, the FCC required the Bell Operating Companies, and eventually GTE, to file federal tariff provisions that offered basic serving arrangements and basic service elements that were specifically designed for ESPs to use in providing enhanced services to ESP customers.<sup>62</sup> The Commission determined that the availability of these additional functionalities did not undermine the ESP access charge exemption and ISPs are free to continue to obtain access through business lines.<sup>63</sup> Similarly, ADSL is simply an added functionality that is available should ISPs wish to take advantage of this new functionality and does not attempt to impose switched access charges on ISPs.

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<sup>61</sup> Nonetheless, some commenters seem to believe that the switched access charge exemption should apply to these dedicated access charges as well. Yet in order for these charges to be eliminated, GTE would seemingly be forced to give away the service for free.

<sup>62</sup> *Filing and Review of Open Network Architecture Plans*, 4 FCC Rcd 1, 144-46 (1988). Some BSAs and BSEs were also made available in state tariffs. Of course, enhanced services are now termed information services.

<sup>63</sup> Commenters (Splitrock at 3; CompTel at 3) also point to paragraph 346 of the *Access Charge Order* in support of intrastate treatment for ISP calls. Yet that paragraph merely acknowledges that ISPs currently purchase access through state-tariffed offerings. This practical recognition of the procedural impact of the access charge exemption does not alter jurisdiction of GTE's ADSL service.

Many commenters also continue to cling to the designation of ISPs as “end users” as justification for intrastate treatment.<sup>64</sup> However, the Commission has only stated that “enhanced service providers are *treated as end users for purposes of applying access charges*.”<sup>65</sup> That limited designation does not alter the jurisdictional analysis of the end-to-end communication. Indeed, the Commission has determined that, even when an entity is an “end user,” the Commission will analyze the totality of the underlying communication in determining the proper regulatory treatment.<sup>66</sup> In its “leaky PBX” order, the Commission levied an interstate access charge on physically intrastate private lines between a customer’s premises and a customer’s PBX because the PBX could route an end-to-end interstate communication – this despite the PBX’s status as an “end user.”<sup>67</sup> Therefore, whether the “communication from its inception to its completion”<sup>68</sup> is interstate will determine the jurisdiction of the service, regardless of any party’s status as an “end user.”

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<sup>64</sup> Ohio at 3; ITC at 6; Splitrock at 2; CIX at 2.

<sup>65</sup> *Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631 at n.8 (1988) (emphasis added).

<sup>66</sup> See, e.g., *MTS and WATS Market Structure*, 97 FCC 2d 682, 711-12 (1983); *MTS and WATS Market Structure*, 97 FCC 2d at 868-870.

<sup>67</sup> ALTS at 18 attempts to distinguish the leaky PBX case, because a leaky PBX “function[s] much like a carrier” and “involve[s] a second telecommunications message, not an information service.” This attempt fails. First, an ISP functions as much like a carrier as the PBX does. Second, both PBX customers and ISPs are “end users.” Finally, as set forth above, the mere fact that an information service is included does not alter the traditional end-to-end jurisdictional analysis.

<sup>68</sup> *United States v. AT&T*, 57 F. Supp. 451, 453-5 (S.D.N.Y. 1944), *aff’d*, 325 U.S. 837 (1945).

### C. ADSL is a Federal Access Service

Finally, GTE's ADSL service is properly characterized as an "access service" under 47 C.F.R. § 69.2(b).<sup>69</sup> An "access service" is defined as including "services and facilities provided for the origination or termination of any interstate or foreign telecommunication."<sup>70</sup> The relevant definition therefore rests on the nature of the transmission,<sup>71</sup> not the identity of the purchaser, the presence of an IXC,<sup>72</sup> or the existence of any toll service.<sup>73</sup> ADSL is also a form of "telecommunication," and the

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<sup>69</sup> Although ADSL may ultimately be characterized as some subset of access services, such as the "information access" or "exchange access" services contemplated by Section 251(g) of the Act, such a determination is not necessary to establish the jurisdiction of the Commission over the service.

<sup>70</sup> US West at 7-8; Ameritech at 17-18. ALTS ominously claims that GTE is attempting to "smuggle an access finding" into this proceeding only for reciprocal compensation purposes. ALTS at 2. To the contrary, GTE raised the "access service" definitional issue in response to Paragraph 6 of the Designation Order where Focal and ICG question whether ADSL is properly considered an "access service."

<sup>71</sup> See, e.g., *General Telephone of California v. FCC*, 413 F.2d 390, 401 (D.C. Cir. 1969).

<sup>72</sup> LECs cannot establish user restrictions. *In the Matter of Petition of First Data Resources, Inc. Regarding the Availability of Feature Group B Access Service to End Users*, 1986 WL 291786 (May 28, 1986). Moreover, the Commission has never suggested that access services must be purchased by IXCs, and even if there were such a requirement, IXCs are free to utilize GTE's ADSL offering if they so desire.

<sup>73</sup> Despite ICG's erroneous statement to the contrary, ("Therefore, the Commission should continue to recognize that advanced services are not exchange access services." ICG at 8), the Commission has yet to determine whether ADSL is an exchange access service ("To the extent that advanced services are exchange access services . . . .") *Advanced Services NPRM* at ¶ 61.

offering plainly meets the definition of that term.<sup>74</sup> Thus, ADSL is a service used to originate and terminate interstate communications and is therefore properly classified as an access service.<sup>75</sup>

#### **V. There Is No Threat of a Price Squeeze Based on Federal Tariffing of ADSL**

Remarkably, Northpoint, to whom the designated price squeeze argument is attributed, now states that "it has no objection to a Commission decision that ADSL is an interstate service."<sup>76</sup> Northpoint also concurs in GTE's judgment that "if state and federal regulators do their jobs, there can be no price squeeze."<sup>77</sup> Based on Northpoint's position that there is nothing inherent in federal jurisdiction that will create or exacerbate the potential for a price squeeze, the Commission should reject the price squeeze jurisdictional theory.

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<sup>74</sup> The Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). This definition is also consistent with the Commission's *Advanced Services Order*. *Advanced Services Order* at ¶ 35.

<sup>75</sup> GTE also notes that many other access services used by ISPs, including private lines and frame relay access services, are tariffed as access services at the federal level. See, e.g., *Filing and Review of Open Network Architecture Plans*, 4 FCC Rcd 1 (1989).

<sup>76</sup> Northpoint at 3. Indeed Northpoint does not seem to care about jurisdiction so long as its pricing concerns are addressed: "if the Commission is not willing to require imputation, it should defer to the states."

<sup>77</sup> Northpoint at 3; GTE also notes that, contrary to the suggestion of ADI at 11-14, Northpoint agrees that if unbundled elements and ADSL are priced correctly, the Commission cannot find that an unlawful price squeeze has occurred.

As set out in GTE's Direct Case, the price squeeze argument irrationally presumes that both state and federal regulators will fail to perform their respective responsibilities, ignores the dual regulatory structure inherent in the Act, and fails to recognize that the Commission is fully capable of fulfilling its responsibilities in evaluating the ADSL tariff.<sup>78</sup> Thus, based on the alleged threat of a "price squeeze," there is no basis for Commission abdication of its jurisdiction over tariffing this interstate service.<sup>79</sup>

#### **VI. The Other Matters Raised by the Commenters Should Be Rejected as Beyond the Scope of the Designated Issues**

As set forth above, the commenting parties raise a host of other issues that were not designated for investigation.<sup>80</sup> The FCC must refuse to address these issues since they are beyond the scope of the designation order. Nonetheless, GTE takes this opportunity to address three non-designated issues in response to various arguments raised by other parties: (1) reciprocal compensation, (2) unbundling and (3) nondiscriminatory treatment. As set forth in its initial pleading, "whether a CLEC which receives 'dial up' Internet access traffic from an ILEC customer is entitled to

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<sup>78</sup> GTE Direct Case at 24-26.

<sup>79</sup> The Public Utility Commission of Ohio does comment that contrary to GTE's assertion, some price data may not be readily available for review due to confidentiality concerns. Ohio at 13; see *also* ALTS at 14-15. However, GTE believes both state and federal regulators have full access to the data they need to do their respective jobs. If input from interested parties is necessary, regulators may make limited disclosures or require interested parties to sign non-disclosure agreements.

<sup>80</sup> See MCI at 24; Covad at 12-15.

reciprocal compensation for terminating traffic from the ILEC need not be decided here."<sup>81</sup> In addition, GTE will make an appropriate filing with the Commission to provide an option to allow direct connection to its DSLAM without using GTE's frame relay service based upon a bona fide request to do so. Finally, of course, GTE will provide ADSL service to any affiliate on the same nondiscrimination terms and condition as third parties consistent with federal regulatory rules.<sup>82</sup> Although GTE wishes to clarify these positions, this clarification in no way should expand the scope of this proceeding beyond the discrete designated issues.<sup>83</sup>

The Commission has complete latitude to determine which matters to designate.<sup>84</sup> Here the Commission has only designated two issues: (1) jurisdiction and (2) the potential for a price squeeze created by dual jurisdiction. To the extent that other concerns arise related to GTE's ADSL service, the Commission should require that these parties utilize the agency's complaint procedures. To the extent that issues

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<sup>81</sup> GTE Direct Case at 7. Other commenters have agreed with this assertion. AT&T at 9; RCN at 4; ITC at 8; ICG at 10-13.

<sup>82</sup> See ISP/C at 7-10(discussing discrimination and unbundled access); Hyperion at 8 (same).

<sup>83</sup> GTE also notes that some commenters (VA at 4; Ohio at 6; GST at 7-8) attempt to place ADSL into the intrastate category based on the mistaken impression that GTE's ADSL service includes traditional voice service.

<sup>84</sup> *MCI Telecommunications Corporation v. FCC*, 917 F.2d 30, 41-42 (1990) (The Commission's decision not to investigate a tariff is unreviewable. Even if the Commission should designate an issue it need not decide it, provided that Commission offers an acceptable reason).

arise based on broader ADSL policies, the Commission may use its rulemaking or inquiry procedures to resolve those matters.

### CONCLUSION

For the foregoing reasons, the Commission should find that ADSL-provided service is properly tariffed at the federal level. Under the Commission's long-standing end-to-end jurisdictional analysis, ADSL traffic has a significant interstate component and is inseparable. Federal tariffing based on this analysis in no way exacerbates the potential for a "price squeeze." By allowing GTE's tariff to continue in effect, the Commission will foster significant benefits to consumers and advance the Commission's and Congress's fundamental goal of expanding the availability of advanced communications capabilities.

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### **Certificate of Service**

I, Ann D. Berkowitz, hereby certify that copies of the foregoing "Rebuttal of GTE" have been mailed by first class United States mail, postage prepaid, on September 23, 1998 to all parties of on the attached list.



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